THE TRIALS OF JURY TRIALS.

AN American lawyer in London can find no more instructive and fascinating occupation than wandering about the Inns of Court. He will see much that is familiar and much that is new and strange. In comparing English procedure with our own he will loyally maintain the superiority of the latter, but, probably, will be candid enough to admit that we may yet learn many valuable lessons from the former.

A few years ago I drifted into the court room of Mr. Justice Hawkins. A negligence cause was on trial. The defendant's horse had kicked the plaintiff's shin bone, with resultant damage direct and consequential. The bone had not been fractured, but the kick had produced all the familiar symptoms of permanent and progressive mental and physical disintegration, which happily, on both sides of the Atlantic, disappear soon after the verdict is affirmed on appeal. The Judge delivered a brief charge and the jury, after a short conference, during which several questions were asked of the court and answered, without leaving their seats, rendered a verdict of thirty pounds for the plaintiff. From the commencement of the charge to the rendition of the verdict scarcely ten minutes had elapsed.

Another cause was called and, to my surprise, the barrister upon whose shoulders rested the burden of proof arose and began divesting himself of that burden by an opening address to the same jury. No challenge was interposed and no questions were asked. The nature of the litigation was not stated, the names of the parties were not mentioned. It seemed to be taken for granted on all hands that the jury were a part of the court, sworn to do justice, and that both court and jury could safely be relied on to be honest and impartial.

Naturally, this scene was contrasted in my mind with similar ones in the courts of this country. In such a controversy the American judge would probably consider it

his duty to expound the law of negligence *in extenso* in its relation to horses, kicks and shin bones. Having devoted half an hour or so to the law, he would deem it expedient to enter upon a discussion of the facts, concluding with the helpful, luminous and original admonition to the jury to find for the plaintiff if they believe the plaintiff's witnesses, but in no event to do so if they believe the defendant and his witnesses. At the conclusion of the Judge's address more valuable time would be wasted in requests to charge. This ceremony, as an exhibition of legal gymnastics between court and counsel, is sometimes interesting, but no one familiar with the inconsequential nature of the proceeding can hear without indignation of a righteous verdict being upset because of an "error" then committed. So far as influence upon the jury is concerned the requests might as well be propounded in Greek and answered in Hebrew.

The practice of handing up written requests before the charge is wise and helpful, but oral requests afterwards, if taken seriously, as they sometimes are by technical appellate minds, become a grotesque and lamentable travesty on justice.

When neither court nor counsel can think of anything else to say, a situation which sometimes occurs, an officer is sworn and the jury retires. After wrangling for hours and being marched back several times for additional "instructions," a verdict is reached or a disagreement is recorded.

Let us follow a little further the American parallel. After the last exception has been noted and the jury has left the court room, another cause is called and the work of empaneling a jury commences. From twenty to thirty busy men have been compelled to remain in the court room awaiting the conclusion of the previous cause, and from these the new jury is to be chosen. Twelve men are called and take their seats in the box; this is done to start the proceedings. Then begins a series of questions which proceed upon the basal presumption that though there may be honest and competent men in the box, the competent men are not honest, and the honest men are not competent. Each juror is separately interrogated. Nothing relating to his past, present or future is omitted.

Does he know the defendant, or his partner, or his wife, or his counsel?

Can he read and write?

Does he own property, and, if so, how much?

What is his age and the nature of his business?

He is then informed as to the nature of the controversy, and should it chance to relate to an injured shin, he is asked if he has conscientious scruples against rendering a verdict for the plaintiff in a negligence suit.

A number of metaphysical problems are set before him relating to the burden of proof, and he is invited to explain his probable action in case the presiding judge encroaches upon his province.

When all have been interrogated, those who know too much and those who know too little are excused, and the catechism begins anew with those who fill the vacated chairs.

At length the plaintiff's counsel sinks down exhausted but satisfied, and the twelve are turned over to the defendant's counsel, who desires information upon an entirely new list of subjects.

At last the jury is ready to hear the testimony, but not until hours of valuable time has thus been lost.

My own experience is that this minute and prolix examination, always personal and often impertinent, is not conducive to good results. I have frequently noticed that the more experienced members of the profession accept the jury, as was done in the English case, without a word. The men are pleased at the confidence reposed in them and are incited to unusual efforts by the implied compliment that a glance alone is sufficient to convince counsel that they are entirely competent to discharge their duties honestly and faithfully.

But these are trivial and unimportant considerations when compared with the really serious defects of the jury system—defects so serious that many thoughtful men have advocated its abolition altogether. In trials of wide public interest the delay in procuring a jury often extends to weeks and months. Hundreds of busy men are inconvenienced, an enormous expense is incurred and the time of bench and bar is frittered away. As a simple and effi-

cient means of arriving at truth, trial by jury, when so impeded, becomes not only an intolerable burden, but a reproach to our jurisprudence.

Consider also the time and labor wasted by mistrials occasioned by the illness, misconduct or ignorance of some member of the jury. A short time ago we read of a verdict, which it had taken months to secure, being set aside because eleven jurors who were in accord placed blue ribbons in their button holes, thus making the one recalcitrant so conspicuous that he consented to a verdict in order to avoid publicity and criticism.

Few people pause to consider what a disagreement means. After years of preparation, involving irksome labor and the expenditure of large sums of money, the witnesses are assembled, expensive counsel are employed and the trial begins. At the end of weeks of arduous and anxious toil, when mind and body are taxed to their utmost, the cause is finally submitted to the jury with the result that they are unable to agree. It is in vain that the presiding judge points out the hardship of the situation. If he urges an agreement with too much vehemence there is danger that the verdict will be set aside by the appellate court whose members, never, perhaps, having sat at *nisi prius*, fail to appreciate the agonizing travail which usually accompanies the birth of a verdict.

It is the delay, the uncertainty, the expense, the inability to reach results, which has put the jury system out of touch with an age of intense material activity—an age when even theology and jurisprudence are taught by electricity and steam, when the survivors are not the fittest, but the swiftest, and when one who is not quick might as well be dead.

In civilized sections of our land men who seek speedy results have established their own tribunals of arbitration, while in the half-civilized and savage sections the rifle, the rope and even the stake have been substituted for the slow processes of the law. What, then, is the remedy?

It is idle to advocate the abolition of trial by jury; its foundations are laid in the organic law of the nation and of all the States, and, deeper still, in the hearts of all liberty-loving Anglo-Saxons. The general sentiment was well

expressed by the western orator with Hibernian proclivities who concluded his peroration in the following impressive words: "With trial by jury I have lived, with trial by jury I shall die."

For one, I should look upon its abolition as a deadly blow to freedom. Without it the republic would be deprived of one of its most effective weapons against absolutism, intolerance and greed. The citizens of a free State will never consent to live without it, for, with all its faults, it is the best system yet devised for the settlement of disputed questions of fact.

In all lands and in every age there are conspicuous instances of judges who have proved arbitrary, ignorant, bigoted, cruel and corrupt. Even in our own country, we have seen the ermine upon the shoulders of despicable creatures, the complaisant agents of aggregated wealth or the willing tools of political vampires. Fortunately, these instances are few, but they prove the danger of leaving the determination of controversies solely to the bench.

The jury system can never be permanently corrupted. Individual jurors may yield to improper influences, but the system will remain free, pure and honest so long as the community at large venerates freedom, purity and honesty. If the people are honest, the jury will be honest, for the jury is but a committee of the people. The jury will be no better than the community from which it springs. As our citizens generally are patriotic and virtuous, so will be our jurors.

But it does not follow that because the institution is inseparable from our government and is venerated by all, that it may not be improved. In almost every other department of human action the needs of a progressive age have been recognized. Old notions have been modified, venerable and venerated customs and establishments have been changed, pursuant to the demands of an enlightened epoch. Constitutions have changed, creeds have changed, jurisprudence has changed, but trial by jury remains in its essential features what it was when the barons insisted upon its maintenance at Runnymede. By all means let us retain it, but by all means let us improve upon it.

In the majority of civil causes it is an exceedingly cum-

bersome and inefficient method of reaching a result. Causes involving commercial transactions, expert knowledge, careful mathematical calculations, or the consideration of long and intricate accounts, and many others, which will readily occur to the practitioner, would much better be decided by a trained legal mind than by a jury. On the other hand, it might be dangerous to remove from the jury causes where the issue of fraud is presented, negligence suits and those involving injury to person and character. It may be urged that it will be difficult to draw the line between those suits which should be tried by the court and jury respectively, but the great majority of causes will naturally arrange themselves in the one category or the other and the few which lie in the debatable land between may well be left to the discretion of the court. There is very little danger of usurpation.

It is the experience of all familiar with the subject that no lawyer is anxious to decide a sharp question of fact, involving perjury upon one side or the other. If there be any excuse for sending it to a jury it is availed of in almost every instance.

Amendments to the constitution and statutes restricting jury trials to the class of causes indicated, or, at least, vesting in the court greater discretion in the matter, would afford much relief. In many of the States causes involving the consideration of long accounts may be referred, but the unyielding provisions of the Federal Constitution make the presence of a jury imperative in all common law actions unless the parties stipulate to try the cause before the judge or a referee.

In my own experience, for instance, I have sat for weeks and months in the United States Circuit Court with a jury where the questions in issue were of such a nature that by no possibility could any of them reach the jury, and yet the court was powerless to dispense with their services. Bankers, merchants, manufacturers, active men in many vocations were compelled to sit as idle listeners merely to hear verdict after verdict directed by the court. Counsel on both sides agreed that no disputed question of fact could arise and yet declined to dispense with the jury in order that no question as to the regularity of the proceeding

might be raised on appeal. And so the dreary farce went on, the court endeavoring to prevent open insubordination from irritated and persistent jurymen, recognizing, meanwhile, the absurdity of the proceeding and the justice of their plea for release.

I believe it is a mistake to think that there would be any general regret were jury trials abolished in the class of civil causes to which I have alluded. In bankruptcy and in certain admiralty causes jury trials may be demanded and yet I have never known the option availed of but in one instance.

Again, it is generally the case that disagreements result from the dishonesty, stubbornness or stupidity of one man. In almost every instance it will appear that it is a single juror who either will not or cannot understand the arguments of the other eleven. Debate soon degenerates into denunciation, the majority do not attempt to conceal their contempt and the isolated one enters into a state of intellectual coma where no persuasion can reach him. Were the law amended so that nine or ten jurors after a certain number of hours (let us say four or five) could, with the approval of the court, render a verdict, disagreements would rarely be recorded. Should such an amendment operate satisfactorily, there would probably be no objection to extending it to criminal cases, at least to misdemeanors. The requirement that several hours must elapse before less than twelve can render a verdict and the necessity of obtaining the approval of the court make hasty or ill-considered verdicts impossible. Modifications and improvements along the lines thus indicated have been tried and tried successfully in several of our States; also, I am informed, in Australia,

Again, grand jury presentments might be restricted to the more aggravated offenses, felonies and the like, without the slightest danger to our liberties.

Can anything be more absurd than the summoning of twenty-three men from their vocations and organizing them with pomp and ceremony into a dignified body to hear the testimony and pass upon the momentous question whether the defendant shall be presented for trial upon the charge of depositing an obscene postal card in the mails?

Or take another illustration: Most people will deem it incredible that at the close of the nineteenth century it is an infamous crime punishable by both fine and imprisoment to give a glass of beer to an Indian, but so it is. Draco never conceived of anything so grimly grotesque.

Until 1884 these cases were disposed of by information, and the evil was thus reduced to the minimum, but since the decision of the Supreme Court in *ex parte* Wilson, 114 U. S., 417, holding that any offense which may be punishable by imprisonment at hard labor is an infamous offense, it is necessary to present them all to a grand jury. Thus if often happens that a dozen witnesses are summoned from their homes and detained for days in a distant city at an expense of hundreds of dollars to the Government because a glass of beer or a gill of whiskey has been placed in the hands of an Indian.

To bring the machinery of a grand jury to bear upon such attenuated sins is like using one of Carnegie's steam hammers to crack a hazel nut. The expense to the people of presenting these petty offenders through the medium of a grand jury must aggregate considerably more than a million dollars annually.

I am aware that many erudite members of the profession are opposed to the slightest change regarding the delays, the disagreements and vexations of the present situation as necessary adjuncts of our civilization, and as inseparable from it as are the *habeas corpus* and the ballot.

"The stubborn juror is the sheet anchor of our liberties," says one. "The one or two jurors who obstruct an agreement by their so-called obstinacy prevent injustice oftener than they cause it," says another.

I once asked an eminent English judge why they continued the clumsy system of barristers and solicitors. He gave me a look of compassionate rebuke, the kind of look one might expect who has said something uncomplimentary of the Queen, and replied, "Why, we have always had it." To his mind this was conclusive. The point was not even debatable. A somewhat similar position seems to be satisfactory to those who, in this country, deem it sacrilege to suggest improvements. With entire respect for those who hold contrary views I venture to think that the practical is

sometimes lost sight of in the effort to reach absolute perfection.

It is, of course, possible that one man may know more than eleven, but to place in his hands the power arbitrarily to stop the wheels of litigation comes very near to sanctioning those evils which trial by jury is supposed to prevent. Instances may exist where in civil causes injustice has been prevented by a disagreement. I have never encountered such an instance, but grant that it is so. On the other side of the ledger must be placed the wasted time, the lost money, the inconvenience, the delay, the inability to gather the witnesses again and the frequent destruction of a righteous claim.

Every lawyer of long practice will recall many causes where, pending a second trial, death, insolvency or removal of witnesses has made further prosecution impossible. Justice has been strangled by inefficiency. The object of a trial is undoubtedly to arrive at truth, but it is important that the goal should be reached before mind, body and estate have been shattered in the contest.

The runner starts in the flush of youth strong in body and buoyant in hope. When almost in sight of the coveted prize he is told that he must go back and start anew. He retraces his steps and begins the weary race again, discouraged but not yet helpless. At the end of life, broken with much striving, ambition, hope and fortune gone, he clutches the prize believed to be of incomparable value, for it is inclosed in a casket inscribed with the words, "This is truth." He has "arrived at truth," but only to see the reward for which he has striven crumble into ashes in his hands. He has but strength to murmur, "Too late!" ere he sinks unconscious by the wayside.

Absolute perfection is impossible in any human institution. Perfection without practical results is imperfection. Men go to law to gain something tangible. They are not ambitious to settle the law. Success without money is like faith without works. The ordinary litigant would infinitely prefer to be defeated by a wrong verdict or an erroneous ruling, if it be done at once, than to come out victor after years of strife with nothing left but a paper decision. It takes less time and it costs less.

It may be conceded that a suit which has been tried by six juries, which has been distilled in the alembics of successive appeals, and which has finally received the seal of approval of the Supreme Court of the United States, has reached the acme of human perfection. It is probable, however, that the successful party who has disbursed three times the amount of the recovery may sigh for a system which embodies a little less perfection and a little more common sense.

Instead of simplifying legal procedure, the tendency is more and more to complicate it and to make the disposition of an ordinary lawsuit so expensive and interminable that none but the boldest combatants dare enter the lists.

Law business has been driven from the rural districts to the large cities, and it is a most curious fact that the country lawyers have been active agents in producing this result. Almost to a man they have insisted upon the right of their clients to carry the smallest dispute to the highest appellate tribunal. In other words, they have insisted upon their client's right to destroy himself. The specious argument against making the Court of Appeals "a rich man's court," has been to their minds conclusive. It never seems to occur to them that in keeping the highest appellate tribunals open to the poor man with the small claim, they are playing the game of the millionaires and the great corporations. The last decision in a cause may be right, but it is not right solely because it is the last.

What is true of fribbling and unreasonable appeals is also true of the defects and delays of the jury system – they discourage honest litigation. They are in the interest of the sharper and the monopolist. Every reform which has for its object economy and speed should be encouraged. Men with small claims used to bring their quarrels to the courts; now they settle them or put them down to profit and loss.

When the epidemic of motions, appeals, new trials and mis-trials through which every contested cause must now pass has become intolerable, a system will be devised which will give to every litigant one fair and speedy trial and one appeal. When this day arrives men will wonder how they staggered on under their present burden. One can hardly

overestimate the beneficial results that would follow if all the codes and code abominations were dumped into the sea and a new system of procedure were organized under the single watchword, *Simplicity*. More modern machinery and less of it, abler engineers and fewer of them, is what the needs of the age demand.

Although intelligent men may differ regarding radical changes in the jury system, all must admit that reforms, which have been tried and approved, looking merely to the improvement in the *personnel* of jurors, should be universally adopted. *Imprimis*, the number of exemptions should be reduced; it is now so large that except in the great cities fully half the jurors are drawn from the agricultural class. Although farmers make excellent jurors, it is the spirit of the law that all vocations should be represented in the jury box. Naturally it makes a busy man indignant to be called upon to perform jury duty when his neighbor, who has no occupation, is exempt because, for instance, he once happened to be a member of a volunteer country fire department. Men will be more willing to serve when there are no unfair discriminations.

The task of selecting jurors should no longer be left to supervisors, town clerks and assessors where favoritism and political influence are potent factors in putting on and leaving off names from the roll. In those counties where jurors are selected by a commissioner I am informed by those well qualified to speak that the beneficial results are so marked that a change to the old methods would be regarded as a public calamity. The smaller counties cannot, perhaps, afford the expense of a commissioner, but the duty might easily be delegated to the county judge or surrogate, or it might be performed by a state officer, or commissioners might be appointed for judicial or congressional districts. The *modus operandi* is not important, so long as jurors are selected by one competent, responsible authority whose business it is to see that no one is put on the rolls who is not legally, physically and mentally competent to serve. The duty of winnowing the wheat from the chaff should fall upon the commissioner, thus dispensing with the usual ceremony of calling upon jurors at the opening of the court to present their excuses. It often becomes necessary

to draw twice as many names as are needed, because the *venire* is sure to contain the names of men who are dead, exempt, deaf, blind, sick, incompetent or otherwise disqualified. If the examination were conducted out of court, these names would never appear upon the rolls. In short, when a juror is summoned he should understand that he is drafted to serve and not merely to exercise his ingenuity in inventing disingenuous excuses.

Again, the system should be so perfected that when a juror has actually served at one term he should not be called upon to serve again for a year at least, in any event. Although I have no patience with the typical shirk who is ready to resort to methods which are questionable, if not actually dishonest, to avoid his duty, I confess I have often had my sympathy aroused on behalf of men who are frequently summoned, particularly in the large cities, to do jury duty in state, federal and municipal courts and sometimes compelled to sit during several terms in a single year. Such hardships make the duty irksome and encourage the malingerer and the liar. On the other hand, were it the law that but one annual service is required, all decent and patriotic citizens would deem it a duty to serve and a dishonorable act to present an inadequate excuse.

An employer who discharges a servant while doing duty as a juror is unfit to enjoy the blessings of a free government. Stringent laws should be enacted, for the punishment of such miscreants.

In brief, the inequalities, the injustice, the unnecessary hardships at present existing should be removed, and when they are, right-thinking men will regard it as much a duty to support the institutions of our country in peace as to defend them when assailed in war.

I cannot doubt that if the reforms, thus crudely suggested, were adopted, that even the most violent assailants of jury trials would be brought to the conclusion that it is the best system devised by the human intellect for the trial of questions of fact.

In any event, discussion can only lead to beneficial results and he who contributes anything of value will have "done the state some service."

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